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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91202493
Party	Defendant Adam Swan
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Submission	Opposition/Response to Motion
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Date	10/12/2012
Attachments	doc00449920121012104729.pdf (22 pages)(2707994 bytes)

AMH markets and sells adult clothing under the trademark “Lady Gaga.” Id., Exhibit C.

Essentially, AMH argues that, as a matter of law, there is a likelihood of consumer confusion between the marks “Baby GaGa” and “Lady Gaga.” Id. at 5-6. Swan came up with his “Baby GaGa” concept in 2004-2005, when his daughter, Sofia, was born and he was able to see first-hand how the baby clothing business was thriving. Swan’s Answers to Interrogatories, Answer No. 14, see attached Exhibit “A”. Because babies say “gaga,” “Baby GaGa” struck Swan as an easy-to-remember concept. Id. In October 2009, he had an idea to develop and market a baby “onesie,” which would utilize a high-tech material to keep a baby dry and comfortable. Id. Swan plans to target new parents as his primary consumer group. Id., Answer No. 10(b).

SUMMARY JUDGMENT STANDARD

Summary judgment may only be granted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); see also T.B.M.P. § 528.01. Summary judgment is an extreme remedy which should be sparingly employed. Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970). The moving party bears the burden of demonstrating both the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. Doff v. Brunswick Corp., 372 F.2d 801, 805 (9th Cir. 1966). All evidence must be viewed in the light most favorable to the non-moving party. Adickes v. Kress & Company, 398 U.S. 144, 157 (1970). Because the focus in trademark disputes is on the purchasing public’s state of mind, “[d]isputes between parties as to trade-mark validity and infringement can rarely be determined satisfactorily on a motion for summary judgment.” Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, 179 F.2d 265, 269 (7th Cir. 1950).

ARGUMENT

Before AMH may be awarded summary judgment, it must meet its burden of showing no genuine issue of material fact exists as to whether the marks “Baby GaGa” and “Lady Gaga” are likely to confuse consumers. AMH fails in its task on at least three (3) separate scores, each of which is wholly sufficient on its own to deny summary judgment. Three genuine issues of material fact still exist: (1) whether the doctrine of unclean hands bars AMH from the relief it seeks; (2) whether there is indeed a likelihood of consumer confusion; and (3) whether “Gaga” has become a generic term. Each is discussed below in turn.

I. UNCLEAN HANDS

Ms. Germanotta, and, by and through her, AMH, have come to this Court with unclean hands. The ancient doctrine, “He who comes into equity must come with clean hands,” Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 241 (1933), has long been applied in trademark disputes. See Belaval, Inc. v. Perez-Perdomo, 488 F.3d 11, 15 (1st Cir. 2007); Texaco P.R., Inc. v. Dep’t of Consumer Affairs, 60 F.3d 867, 880 (1st Cir. 1995); Dollar Systems, Inc. v. Avcar Leasing Systems, Inc., 890 F.2d 165, 173 (9th Cir. 1989). The doctrine applies when the plaintiff’s, or opposer’s, “tawdry acts ‘in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.’” Belaval, 488 F.3d at 15, quoting Texaco, 60 F.3d at 880. Critically, as far as summary judgment is concerned, the application of the unclean hands doctrine raises primarily a question of fact. Dollar Systems, 890 F.2d at 173. “The doctrine bars relief to a plaintiff who has violated conscience, good faith or other equitable principles, *as well as to a plaintiff who has dirtied his hands in acquiring the right presently asserted.*” Id., emphasis supplied.

In 1984, two years before Ms. Germanotta was born, Raincloud Productions, Inc. secured and registered with the United States Copyright Office a certain Copyright numbered SR0000054401. The Copyright was granted for an original sound recording written by Roger Taylor and performed by Queen, entitled “Radio ga-ga.” The Copyright remains in full force and effect, and Raincloud Productions, Inc. is still the present holder. The song was a worldwide success for Queen, reaching number one (1) in nineteen (19) countries and number sixteen (16) on the *Billboard Hot 100* in the United States.¹

On several occasions, openly and in public, Ms. Germanotta has described how she took her stage name, “Lady Gaga,” directly from the Queen song, “Radio ga-ga.”² Indeed, one well-publicized story goes as follows.³ Ms. Germanotta was in the process of trying to create a stage name when her music producer, Rob Fusari (“Fusari”), text messaged her “Lady Gaga.” Fusari explained, “Every day, when Stef came to the studio, instead of saying hello, I would start singing ‘Radio Ga Ga.’ That was her entrance song.” Ms. Germanotta wrote back, “That’s it,” and declared, “Don’t ever call me Stefani again.” As we are reminded throughout Opposer’s Memorandum, Ms. Germanotta has gone on to great success performing under the stage name “Lady Gaga.” She has capitalized on the success of Queen and Queen’s song to increase her own, without first acquiring the “Radio ga-ga” Copyright or rights to its use. Yet now she complains Swan has “commandeered the most recognizable portion of AMH’s marks – the term ‘GAGA?’” Opposer’s Memorandum, p. 19. Did not Ms. Germanotta “commandeer” the exact

¹ Barry Lazell (1989) *Rock Movers & Shakers* p. 404, *Billboard Publications, Inc.*, Retrieved January 14, 2011.

² http://www.youtube.com/watch?v=vQD_C24yjEM, last visited September 28, 2012;
http://www.youtube.com/watch?v=c_JQVMnlXS8, last visited September 28, 2012;
<http://www.youtube.com/watch?v=RzuBTC2kZ8o>, last visited September 28, 2012;
<http://www.youtube.com/watch?v=FXCWmN49HxQ&feature=related>, last visited September 28, 2012;
<http://www.sheknows.com/entertainment/articles/851311/where-did-lady-gaga-get-her-stage-name>, last visited September 28, 2012;

³ Taken from the *Star-Ledger* at

http://www.nj.com/entertainment/music/index.ssf/2010/01/lady_gaga_her_outrageous_perso.html, last visited September 28, 2012.

same term? She exploited the copyrighted creation of another and put it to her own use. She acquired the stage name “Lady Gaga,” along with the corresponding trademarks at issue in this case, by committing copyright infringement. Ms. Germanotta and AMH have dirtied their hands in acquiring the rights they currently assert, and, as such, are barred from opposing Swan’s Application.

II. NO LIKELIHOOD OF CONSUMER CONFUSION

Thirteen (13) factors may be considered when determining likelihood of consumer confusion. In re E.I. DuPont de Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973). The analysis, however, can usually be concluded on examination of the two most dispositive factors: (1) similarity of the marks, and (2) relatedness of the goods. See Han Beauty, Inc. v. Alberto-Culver Co., 236 F.3d 1333, 1336 (Fed. Cir. 2001). This is all that is necessary in the present case to demonstrate the inappropriateness of summary judgment.⁴

A. The Marks Are Not Sufficiently Similar.

AMH’s discussion of this all-important Du Pont factor can be summarized, essentially, as a lengthy side-by-side comparison of the marks in question followed by a conclusory statement. Opposer’s Memorandum, p. 17-20 (proclaiming “there is no disputing the fact that the parties’ marks are similar”). Two major objections must be made to AMH’s discussion.

First is that a side-by-side comparison is simply not the correct test to apply. See G.D. Searle & Co. v. Chas. Pfizer & Co., 265 F.2d 385, 388 (7th Cir. 1959); Colburn v. Puritan Mills Inc., 108 F.2d 377, 378 (7th Cir. 1939); Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, 179 F.2d 265, 269 (7th Cir. 1950). After comparing the letters and syllables and sounds of “Baby GaGa” and “Lady Gaga,” AMH provides a long list of cases in which “confusion has

⁴ By focusing his discussion on these two factors, Swan does not waive his right to argue the remaining Du Pont factors at a later time nor does he concede Opposer has met its burden of establishing any of the remaining factors on the record to date.

been found between marks with the same and/or greater differentiations than are present here.”

Opposer’s Memorandum, p. 18. The problem with this sort of argument is that for every case finding sufficient likelihood of confusion, there is another case finding insufficient likelihood of confusion. See, e.g. Pennzoil Co. v. Crown Central Petroleum Corp., 140 F.2d 387 (4th Cir. 1944) (no likelihood of confusion between “Pennzoil” and “Greenzoil” for motor oil); Syncromatic Corp. v. Eureka Williams Corp., 174 F.2d 649, 651 (7th Cir. 1949) (no likelihood of confusion between “Syncromatic” and “Oil-O-Matic” for oil burning heaters); Kensington Steel Co. v. Nichols Engineering and Research Corp., 188 F.2d 397 (CCPA 1951) (no likelihood of confusion between “Nercalloy” and “Oroloy” for metal castings); Upjohn Co. v. Schwartz, 246 F.2d 254, 262 (2nd Cir. 1957) (no likelihood of confusion between “Syrocol” and “Cheracol” for chemicals). In G.D. Searle, the Seventh Circuit went out of its way to point out this precise problem before holding side-by-side comparisons an improper test to apply. 265 F.2d at 388-389 (stating “In this type of litigation reference to decisions of courts as to other trademarks is not of great help”). Instead, comparing the trademarks “Bonamine” and “Dramamine,” the court found sufficient likelihood of confusion because “Defendant adopted the name ‘Bonamine’ apparently with the idea of getting as close to ‘Dramamine’ as was legally possible.” Id. at 389. AMH has made no showing of any kind that Swan deliberately chose “Baby GaGa” in an attempt to get as close to “Lady Gaga” as legally possible. Any similarity in letters and syllables and sounds between the two marks is not only inconsequential, but coincidental.

The second objection, related to the first, speaks to the danger of applying a simple side-by-side comparison. Side-by-side comparisons distract us from the real issue at stake in a trademark dispute, and delude us into thinking we can predict consumer behavior by simply

holding one mark up to another. The determination to be made in a trademark dispute is not whether the marks look or sound alike, but “the purchasing public’s state of mind when confronted by somewhat similar trade names singly presented.” Id. at 388; Colburn, 108 F.2d at 378; Albert Dickinson, 179 F.2d at 269. It is for precisely this reason that “Disputes between parties as to trade-mark validity and infringement can rarely be determined satisfactorily on a motion for summary judgment.” Albert Dickinson, 179 F.2d at 269, quoting Marcus Breier Sons, Inc., v. Marvlo Fabrics, Inc., 173 F.2d 29 (2nd Cir. 1949). Determining the purchasing public’s state of mind raises, necessarily, a question of fact which can only be resolved by a fact-finder properly equipped with testimony from the purchasing public. Albert Dickinson, 179 F.2d at 269 (stating, in the context of a trademark dispute between popcorn producers, “The district court will be in much better position to determine the question of likelihood of consumer confusion as to source when it has before it on trial the testimony of the ordinary and usual purchasers of popcorn and the evidence presented as to the manner and conditions under which popcorn is sold by both plaintiff and defendant”); see also Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F.2d 280, 283 (1st Cir. 1947) (holding likelihood of consumer confusion is a question of fact); Skinner Mfg. Co. v. Kellogg Sales Co., 143 F.2d 895, 899 (8th Cir. 1944) (same holding); William R. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526, 529 (1924).

Consumers do not simply compare names when they shop; the type of store and goods, the conditions of the store and goods, consumer impressions of the store and goods, and memories of past purchases all play a role in whether consumers will be confused. See Albert Dickinson, 179 F.2d at 269 (stating “The similarity between a designation and a trade-mark or trade name which it is alleged to infringe is not determined by comparing the two in juxtaposition only. Since it is the effect upon prospective purchasers that is important, the

conditions under which they act must be considered. Purchasers do not always see the goods in juxtaposition. They rely upon memory and vague impressions”). The Seventh Circuit has summarized the difficulties of determining, at summary judgment, whether consumers will confuse one mark for another:

The ascertainment of probability of confusion because of similarity of trade names presents a problem not solvable by a precise rule or measure. Rather is it a matter of varying human reactions to situations incapable of exact appraisal. We are to determine, as was the District Judge, the purchasing public's state of mind when confronted by somewhat similar trade names singly presented. Is the similarity of name or dress such as to delude the public or will the prospective buyer readily differentiate between the two names? We can only contemplate, speculate, and weigh the probabilities of deception arising from the similarities...

Colburn, 108 F.2d at 378. Speculation is not the stuff of summary judgment. Swan has yet to sell a single item of “Baby GaGa” clothing. Who is to say whether consumers will confuse his clothing with AMH’s? AMH would have us believe that when consumers pick up “Baby GaGa” one-piece baby outfits, they will shout out in unison: “Lady Gaga makes baby clothes!” But babies, after all, have been saying “gaga” for thousands of years. Is it not just as likely that consumers will simply think to themselves, “Aw, what a clever name for baby clothing?” Moreover, even if “Baby GaGa” brings “Lady Gaga” to consumers’ minds, “[t]he fact that one mark may bring another mark to mind does not in itself establish likelihood of confusion as to source...[t]he very fact of calling to mind may indicate that the mind is distinguishing, rather than being confused by, two marks.” In re P. Ferrero & C.S.P.A., 479 F.2d 1395, 1397 (CCPA 1973) (finding no likelihood of confusion between “TIC TAC” for candy and “TIC TAC TOE” for ice cream and sherbet). It is still too early to tell how consumers will react to Swan’s product and, thus,

it is too early to bar Swan from using the mark “Baby GaGa” as he sells his product. A genuine issue as to the material fact of likelihood of consumer confusion still exists. The case is not ripe for summary judgment.

B. The Goods Are Not Sufficiently Related.

Contrary to AMH’s assertions (see Opposer’s Memorandum, pgs. 15-16), this Board may consider the differences in the designs of Swan’s and AMH’s goods. Design features are only irrelevant when they are not inherent in the marketing of the goods in question. Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 1337 (CCPA 1981); The Wella Corp. v. California Concept Corp., 558 F.2d 1019 (CCPA 1979); Sheraton Corp. of America v. Sheffield Watch, Inc., 480 F.2d 1400 (CCPA 1973).

The trademark “Baby Gaga” and Swan’s designs for his goods are all inherent in the marketing of his product: baby clothing. In his Answers to Interrogatories, Swan explains how he came up with the concept for “Baby GaGa:” “I thought of the ‘Baby GaGa’ concept in 2004-2005, when my daughter, Sofia, was born and I saw first hand just how the baby clothing business was thriving. As a baby says “gaga” it struck me as a easy-to-remember concept...In October, 2009, I also had an idea regarding a baby onesie. I came up with a design and thought to use a high-tech material which would keep a baby dry and comfortable.” (Answer No. 14). He identifies his primary consumer group as new parents (Answer No. 10(b)). Notably absent from AMH’s filings is any material demonstrating AMH produces or markets baby-specific clothing under the trademark “Lady Gaga” (see Opposer’s Memorandum, Exhibit C, cataloguing the adult clothing sold by AMH but showing no baby clothing). Despite AMH’s protestations that “the parties’ goods compete directly with one another in the exact same category,” this simply

is not the case. Opposer's Memorandum, p. 16. The goods Swan intends to sell are designed for and marketed to an entirely different group of consumers than AMH's. AMH is attempting to drive the word "gaga" from the baby clothing field despite the fact it does not sell baby clothing. But "courts cannot, and will not, permit the holder of...a valid trade name...to extend the rights which arise therefrom to drive a competitor from a field legitimately open to him or to anyone else." Colburn, 108 F.2d at 378. AMH holds a very specific trademark which it uses to sell its goods to very specific consumers; it may not monopolize the word "gaga" to keep people like Swan from marketing very different goods to very different consumers. As the parties' goods do not compete directly with one another, there is little risk their goods will be confused. See Banff Ltd. v. Federated Dep't Stores, 841 F.2d 486, 492 (2nd Cir. 1988).

III. "GAGA" IS NOW A GENERIC TERM

There is a third reason, separate from those already discussed, AMH may not be awarded summary judgment. According to the facts presented by AMH itself, the trademark upon which AMH bases its Opposition no longer holds sway as an effective trademark. Lady Gaga has been undone by her own success.

In Dixi-Cola Laboratories, Inc. v. Coca-Cola Co., 117 F.2d 352, 360 (4th Cir. 1944), the Fourth Circuit, citing the Restatement of Torts, explained what happens when a trademarked term becomes part of the common parlance:

A designation which is initially a trade-mark or trade name ceases to be such when it comes to be generally understood as a generic or descriptive designation for the type of goods, services or business in connection with which it is used...When one has a monopoly of the initial distribution of a specific article over a period of time, and especially if the descriptive name for the article is one difficult to pronounce or remember, there is a likelihood that

the designation which he adopts as his trade-mark for the article will be incorporated into the language as the usual generic designation for an article of that type. When that happens, the designation becomes merely descriptive of the goods and no longer identifies a particular brand or performs any of the functions of a trade-mark or trade name. Moreover, the designation must then be used by others if there is to be any effective competition in the sale of the goods. It is immaterial that the person first adopting the designation made every reasonable effort to avoid this result or that the designation was coined by him and derived meaning only from his use. The designation may be used by others, subject only to [laws against] fraudulent marketing.

Similarly, in Dupont Cellophane Co. v. Waxed Products Co., 85 F.2d 75, 82 (2nd Cir. 1936), the court stated the rule this way: “If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of the it to believe that he is buying the goods of the original trader...the right to use the trade mark must be gone.”

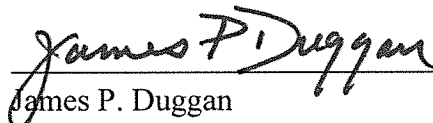
Throughout its Memorandum, AMH emphasizes Ms. Germanotta’s fame. She has sold over 23 million albums and over 64 million singles, we are told. Opposer’s Memorandum, p. 3. She is one of the “100 most Powerful and Influential” celebrities in the world. Id. She has won 5 Grammy awards. Id. She graces the covers of Vogue and Rolling Stone. Id. Sales of AMH’s “Lady Gaga” apparel have been an “overwhelming sensation.” Carter Decl. ¶ 13. “Even the most rudimentary search of the internet” leads to Lady Gaga. Id. at 24. So famous is she, when people say “Gaga” in “press and in casual reference,” they mean her. Id. at 20. Therein lies her problem. “Lady Gaga” has “come to be so public and in such universal use that nobody can be deceived by the use of it.” Dupont Cellophane, 85 F.2d at 82. Her trademark has become “incorporated into the language as the usual generic designation” for all things “Gaga,” from pop music to clothing. Dixi-Cola Laboratories, 117 F.2d at 360. It is immaterial that AMH has made “every reasonable effort to avoid this result or that the designation was coined by [Ms.

Germanotta] and derived meaning only from [her] use.” Id. The trademark “Lady Gaga” has lost its effect and no longer offers Ms. Germanotta or AMH protection. Swan is free to use the term “Gaga” as he sees fit, including in his “Baby GaGa” clothing brand. At the very least, a question of fact exists concerning whether “Gaga” has become a generic term.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Applicant, Adam Swan, respectfully requests that this Board deny Ate My Heart Inc.’s Motion for Summary Judgment.


Respectfully submitted,
Adam Swan,
By his attorney,



James P. Duggan
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Suite 525
Boston, MA 02109
617-523-7222
BBO# 137500

CERTIFICATE OF SERVICE

I, James P. Duggan, hereby certify that on this 13th day of October, 2012, I served a copy of the foregoing Adam Swan’s Opposition to Ate My Heart Inc.’s Motion for Summary Judgment, by electronic e-mail and first class mail, upon Muzamil A. Huq, Esq., Pryor Cashman LLP, 7 Times Square, New York, NY 10036-6569.



James P. Duggan

CERTIFICATE OF FILING BY ESTTA

I hereby certify that on October 13, 2012, Adam Swan’s Opposition to Ate My Heart Inc.’s Motion for Summary Judgment was filed electronically by ESTTA.

/James P. Duggan_____

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application
Serial No. 77/949, 907
For the mark BABY GAGA

ATE MY HEART, INC.,)	
Opposer)	
)	
)	
against)	Opposition No. 91202493
)	
)	
ADAM SWAN,)	
Applicant)	
)	

APPLICANT'S ANSWERS TO OPPOSER'S
FIRST SET OF INTERROGATORIES

Now comes Adam Swan, Applicant, who hereby answers Ate my Heart, Inc., Opposer, First Set of Interrogatories as follows:

INTERROGATORY NO. 1:

Identify all persons with knowledge or information relating to the information contained in and the filing of Application.

ANSWER NO. 1:

Adam J. Swan has information regarding this Application, as does his wife, Lina Swan, and his father, Peter. Also, Mr. Ronald Zagarri and Mr. James Rappaport have information regarding this matter.

INTERROGATORY NO. 2:

Identify all persons with knowledge or information relating to the allegations Applicant asserted in its Answer to the Opposition. As to each person identified in this

interrogatory, state the allegations and the substance of the facts of which the person has knowledge or information.

ANSWER NO. 2:

Please see my Answer to Interrogatory No. 1, supra.

INTERROGATORY NO. 3:

Identify each witness who may be used to present evidence during the testimony period.

ANSWER NO. 3:

Adam J. Swan, 5 Sycamore Lane, Saugus, MA 01906.
Lina Swan, 5 Sycamore Lane, Saugus, MA 01906.
Peter Swan, 96 Cliffside Drive, Plymouth, MA 02360.
James Rappaport, 50 Battery Street, PH05, Boston, MA 02109.
Ronald Zagarri, 65 Bay Street, Dorchester, MA 02125.

I reserve my right to supplement this Answer.

INTERROGATORY NO. 4:

Identify all of Applicant's affiliates, companies, employees, partners, agents, representatives and any other person or entity acting on his behalf, and their respective officers, directors and employees.

ANSWER NO. 4:

James P. Duggan, Attorney at Law, 50 Congress Street, Boston, MA 02109.

INTERROGATORY NO. 5:

Describe in detail the actual and proposed use of the Mark by identifying each type of good or service that bears or is intended to bear the Mark and identifying the manner in which the Mark is (or will be) affixed to or used in connection with each such type of good or service.

ANSWER NO. 5:

Each and every item allowed under Class 25. In July,

2011, I was approved and intended to sell clothing such as hats, headbands, infant and toddler clothing, one-piece clothing, jackets, pants, shirts, shoes, sweaters, tee-shirts, etc. I have also considered various licensing arrangements.

INTERROGATORY NO. 6:

Identify the website addresses (URL's) and the domain names registered by Applicant (or on its behalf) that bear or are expected to bear Applicant's Mark and/or promote or sell Applicant's goods or services that bear or will bear Applicant's Mark.

ANSWER NO. 6:

None at the present time.

INTERROGATORY NO. 7:

For each type of good or service identified in response to Interrogatory 5 above, describe or state in detail:

- a. the date of first use in commerce;
- b. the actual and proposed channels of trade;
- c. the geographic area of distribution of such types of goods, from Applicant to the end-user;
- d. each class of purchasers or customers (i.e., wholesaler, retailer, end-user, etc.) including but limited to the geographic area of each class of purchaser or customer; and
- e. the method or means of purchasing for each class of purchaser or customer (i.e., mail order, sales person, stores, Internet sales, etc.).

ANSWER NO. 7:

- a. No commercial use as of this date.
- b. Retail and wholesale outlets, internet sales, licensing arrangements, etc.
- c. United States of America.
- d. I would propose to sell anywhere, to anyone.
- e. Any legal tender.

INTERROGATORY NO. 8:

For each type of goods or service identified in response to Interrogatory 5 above, describe in detail the actual and proposed price points for such types of goods or services.

ANSWER NO. 8:

I have not yet determined actual and/or proposed price points.

INTERROGATORY NO. 9:

For each type of good or service identified in response to Interrogatory 5 above, if use of the Mark has commenced, state Applicant's annual volume of business in the United States by identifying the annual volume of sales in terms of units and value of the goods from the date of first sale(s) to the date of your response.

ANSWER NO. 9:

None, as of this date.

INTERROGATORY NO. 10:

For each type of good or service identified in response to Interrogatory 5 above, if use of some or all of such goods or services has not yet begun, please state the following:

- a. The date that use of the Mark is expected to begin;
- b. Applicant's intended targeted consumer group or target demographics; and
- c. The amount of money Applicant has earmarked or dedicated to the manufacture and, separately, the promotion of the products or services bearing the Mark.

ANSWER NO. 10:

- a. At the conclusion of this lawsuit.
- b. The primary consumer group would be new parents.
- c. I have not decided the amount of money which would be spent.

INTERROGATORY NO. 11:

Identify representative samples of advertisements, promotions or proposed advertisements or promotions concerning or relating to the sale or proposed sale of Applicant's Goods by specifically describing the medium (i.e., newspapers, consumer magazines, trade publications, electronic advertising via the Internet and catalogues, etc.) in which such advertisement or promotion appeared or is intended to appear, the date of the advertisement or promotion, and the identity of the person(s) employed by or associated with Applicant who was responsible for each such instance of advertisement or promotion or intended advertisement or promotion.

ANSWER NO. 11:

None, as of this date.

INTERROGATORY NO. 12:

State Applicant's total advertising and promotional expenditures made in connection with promoting sales of Applicant's Goods, both on an annual basis and as of the date of first such expenditure to the present.

ANSWER NO. 12:

None, as of this date.

INTERROGATORY NO. 13:

Identify each mark, name or symbol previously or currently considered by Applicant as an alternative to the Mark and for each such alternative, identify the date, persons present when such alternative was considered, the person who suggested such alternative, the reasons why the alternative was not adopted, and all documents referring to the alternative by name, mark or symbol.

ANSWER NO. 13:

I once considered a Kid Hollywood concept, but the word "Kid" seemed to me to connote and older child and I wanted to use the word "Baby" as a part of my concept. I never pursued the "Kid Hollywood" Mark. but the name

"Hollywood" babies was reserved and the name "Baby GaGa" was available and I decided it would be useful to me.

INTERROGATORY NO. 14:

Describe the circumstances surrounding the adoption of the Mark, including but not limited to (i) stating the date when the adoption of the Mark was first proposed; (ii) identifying the person(s) who originally proposed to the Mark for any type of goods; and (iii) identifying each document relating to the adoption and/or the decision to adopt the Mark in connection with any type of goods with which the Mark has been or is proposed to be used or associated.

ANSWER NO. 14:

I thought of the "Baby GaGa" concept in 2004-2005, when my daughter, Sofia, was born and I saw first hand just how the baby clothing business was thriving. As a baby says "gaga" it struck me as a easy-to-remember concept. As it happens, I was busy with being a new father, etc., so I didn't start the Application process for the Mark until early 2010. I went through all of the necessary steps to obtain the Mark through the USPTO. My Mark was entered into the official registry in July, 2011.

In October, 2009, I also had an idea regarding a baby onesie. I came up with design and thought to use a high-tech material which would keep a baby dry and comfortable.

INTERROGATORY NO. 15:

For each instance in which a person recommended or advised against the acquisition, adoption or use of the Mark, or recommend or advised that Applicant contact anyone else for approval either before selecting, adopting, acquiring or using the Mark or thereafter, describe the circumstances surrounding each such instance by at least identifying each such person and stating the substance of such advice or recommendation, the date of the advice or the recommendation and identifying each person receiving such advice or recommendation.

ANSWER NO. 15:

None.

INTERROGATORY NO. 16:

Identify any and all persons Applicant has authorized, licensed or otherwise granted the right to use the Mark in commerce. For each person identified, identify the date of commencement and termination of each such authorization, license or grant, and identify any written license agreements or franchise agreements granting rights to use the Mark.

ANSWER NO. 16:

None.

INTERROGATORY NO. 17:

Describe each instance of which Applicant is aware of actual confusion or mistake regarding Applicant or Applicant's Goods sold or to be sold under the Mark and Opposer or Lady Gaga or Opposer's Goods sold under Opposer's Mark, including but not limited to any misdirected mail, e-mails, telephone calls or orders, and any inquiries concerning any association between Opposer or Lady Gaga and Applicant or their respective goods.

ANSWER NO. 17:

None.

INTERROGATORY NO. 18:

Identify and describe each communication of which Applicant is aware concerning Opposer or Lady Gaga or Opposer's Mark by identifying the date, substance of the communication and the parties to the communication.

ANSWER NO. 18:

I believe that correspondence has been exchanged between my lawyer and lawyers for Lady Gaga.

INTERROGATORY NO. 19:

For each interrogatory, identify the person or persons having principal knowledge with respect thereto, and identify the person or persons who have supplied the information contained in each response.

ANSWER NO. 19:

Adam J. Swan.

INTERROGATORY NO. 20:

For each interrogatory, identify the documents relied upon or referred to facilitate the formation of a response to that interrogatory.

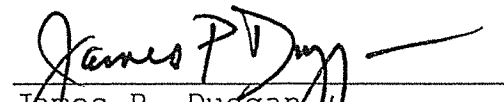
ANSWER NO. 20:

Please see documents produced in connection with Opposer's First Request For the Production of Documents.

Sworn under the pains and penalties of perjury this 19th day of June, 2012.


Adam Swan

Respectfully submitted,
Adam Swan, Applicant
By his attorney,


James P. Duggan
50 Congress Street
Suite 525
Boston, MA 02109
(617) 523-7222

CERTIFICATE OF SERVICE

I, JAMES P. DUGGAN, hereby certify that a true and correct copy of APPLICANT'S ANSWERS TO OPPOSER'S FIRST SET OF INTERROGATORIES is being served upon Opposer's counsel of record, pursuant to the agreement between counsel for the parties to accept service via electronic e-mail where practicable, causing copies to be sent via electronic mail to the following counsel of record:

Muzamil Huq
Pryor Cashman LLP
7 Times Square
New York, New York 10036-6569

This 26th day of June, 2012 signed: /James P. Duggan/